



Queensland Association of
Independent Legal Services Inc

Submission to the Australian Human Rights Commission

Access to justice in the criminal justice system for people with disability

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1. Executive Summary

The National Association of Community Legal Centres (**NACLC**) and the Queensland Association of Independent Legal Services (**QAILS**) share the Australian Human Rights Commission's (**Commission**) concern that many people with disability who require communication supports, or who have complex and multiple support needs, are not having their rights protected and are not being treated equally in the criminal justice system.

NACLC and QAILS appreciate the opportunity to make a submission on the matters detailed in the *Access to justice in the criminal justice system for people with disability – Issues Papers: April 2013 (Issues Paper)* and are pleased to now provide this submission to the Commission.

Section 1 of this Submission explains the collection of case studies for this submission and provides some background to the work of community legal centres (**CLCs**) and the authors.

Section 2 of this Submission highlights some of the barriers faced by people with disability, illustrated with powerful case studies of clients who receive assistance from CLCs. These are separated into the following categories:

- the rights of people with disability who are victims of crime;
- laws that unfairly bring people with disability into the criminal justice system; and
- experiences of people with disability who are charged with crimes.

Section 3 of this submission outlines some suggested reforms that would better protect and promote the legal rights and responsibilities of people with disability who come into contact with the criminal justice system.

Section 3 makes the following recommendations:

Improve training to police, the judiciary, court staff, duty lawyers, prosecutors and private solicitors involved in the criminal justice.

Increase availability and accessibility of legal services.

Improve data collection.

1. About this submission

This submission has been prepared by NACLC and QAILS in cooperation with state and territory associations of CLCs. Case studies were sought from CLCs across Australia and their responses have been collected in this submission. The issues raised and recommendations put forward here are based on the considerable experience CLCs have in assisting clients with disability.

NACLC is the peak national organisation representing community legal centres (CLCs) in Australia. Its members are the state and territory associations of CLCs that represent over 200 centres in various metropolitan, regional, rural and remote locations across Australia.

QAILS is the independent peak body for Queensland CLCs and represents the 32 funded and unfunded member CLCs operating across the State.

CLCs are not-for-profit, community-based organisations that provide legal advice, casework, information and a range of community development services to their local or special interest communities. CLCs' work is targeted at disadvantaged members of society and those with special needs, and in undertaking matters in the public interest. CLCs have been advocating for a rights based approach to equitable access to the justice system for over 30 years. CLCs are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

The following CLCs have contributed case studies and content for this submission:

- 1) **Hunter Community Legal Centre** provides free legal advice and assistance services to disadvantaged people who live, work or study in the Newcastle, Lake Macquarie, Port Stephens, Great Lakes and Hunter Valley regions of New South Wales.
- 2) **Logan Youth Legal Service** offers a legal service for young people (under 18 years) in the Logan City area in Queensland. The service provides legal information and advice for young people and represents them in legal process or in court if required.
- 3) **Mental Health Legal Centre** is an independent, community-based legal centre that offers free, specialised legal advice, advocacy, education and law reform programs for people living with mental illness in Victoria.
- 4) **Northern Rivers Community Legal Centre** is a NSW community legal service, based in Lismore that assists people in the Northern Rivers region from Tweed Heads in the north to Grafton in the south and Tabulam in the west.
- 5) **Prisoners' Legal Service Inc** is a community legal centre providing free legal advice to incarcerated persons and their families on matters relating to imprisonment. The service is based in South Brisbane, Queensland and services the entire state.
- 6) **Queensland Advocacy Incorporated** is an independent, community-based legal, systems and individual advocacy organisation for people with disability in Queensland. QAI provides legal advice and representation to vulnerable adults with disability in matters that include guardianship, administration, restrictive practices and mental health. QAI also provides non-legal forms of assistance to people with disability who encounter the criminal justice system.

- 7) **Redfern Community Legal Centre** is an independent, non-profit community centre dedicated to promoting social justice and human rights. They offer free legal advice, referral and casework to disadvantaged people living in the City of Sydney, Botany Bay and Leichhardt local government areas.
- 8) **Refugee and Immigration Legal Service QLD** specialises in refugee and immigration law. It provides legal help to disadvantaged people who have cases before the Department of Immigration, Migration Review Tribunal, Refugee Review Tribunal and sometimes take cases of public interest to the courts.
- 9) **Suncoast Community Legal Service Inc** provides free legal advice to people within the Sunshine Coast community through its population centres.
- 10) **The Advocacy and Support Centre Inc ('TASC')**, a community legal centre that provides a diverse range of legal services and disability advocacy to people who live in Toowoomba, Ipswich and the whole south-west region of Queensland.
- 11) **Villamanta Disability Rights Legal Service Inc** is a Victorian community legal centre that works exclusively on disability-related legal and justice issues for people who have a disability and a disability-related legal issue.
- 12) **Women's Legal Centre ACT** is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women's access to justice.

The submission was prepared with the assistance of Philip Cooper (Herbert Smith Freehills).

2. Barriers to justice for people with disability

This submission responds to, and provides real examples of, the key barriers to justice experienced by people with disability outlined in the Commission's Issues Paper, particularly the following barriers:

- **Barrier 2:** People with disability do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes; and
- **Barrier 3:** Negative attitudes and assumptions about people with disability often result in people with disability being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.

For the purposes of this submission, all clients have been de-identified to ensure their anonymity and confidentiality are maintained.

2.1 Victims of crime

Studies have found that people with disability are more likely to be victims of crime.¹ However, while people with disability are the highest risk group for abuse and violence, there is a low awareness of this problem in society.² As a result, there has been a failure to address the issue through education and training of police, the judiciary, court staff, duty lawyers, prosecutors and private solicitors involved in the criminal justice. CLCs report that there has been a failure amongst police to provide adequate levels of assistance and protection to clients with disability. Another common problem that the clients of CLCs face is a reluctance on the part of staff in residential settings and police officers to appropriately handle the experiences and testimonies of people with disability who are victims of crime.

In the following case study people seeking the protection of Apprehended Violence Orders or similar orders are provided with limited assistance in preparing their applications, including details about the evidentiary requirements of a successful application.

"Kate" and her friend "Mark" have cerebral palsy. Throughout October 2012, Kate and Mark had three incidents of being verbally abused by "Jenny". In the first instance Jenny called Kate a "spastic slut" and Mark a "spastic c*nt". In the second instance Jenny physically threatened Kate and Mark with a large stick. In the third instance Jenny followed Kate for about 20 minutes while Kate was walked home and then stood outside her house for one hour.

After the third incident, Kate attended the local police station with her mother/carer. On the advice of a police officer, Kate's mother assisted her mother to apply for an Apprehended Violence Order (**AVO**). The Local Court granted Kate an interim AVO, however stated the

¹ Chih Hoong Sin, Annie Hedges, Chloe Cook, Nina Mguni and Natasha Comber, *Disabled People's Experiences of Targeted Violence and Hostility*, Research Report No 21, Equality and Human Rights Commission (2009); Barbro Lewin, 'Who cares about disabled victims of crime? Barriers and facilitators for redress', (2007) 4(3) *Journal of Policy and Practice in Intellectual Disabilities* 170; Richard Sobsey, *Violence and Abuse in the Lives of People with Disabilities: the End of Silent Acceptance?* (Paul H Brookes Publishers, Baltimore, 1994) Christopher Williams, *Invisible Victims: Crime and Abuse Against people with Learning Difficulties* (Jessica Kingsley Publishers, New York, 1995).

² Sobsey, above n 1, 1.

grounds for the order were insufficient and better particulars were required. The initial hearing was adjourned as the defendant had not received the AVO application. Kate (and her mother) then sought assistance from a CLC, who advised on the process of the AVO application, how to complete the application with statutory declaration detailing better particulars and how to serve Jenny.

The CLC represented Kate at the Local Court and assisted in filing the completed statutory declaration. The matter was adjourned again, and at the next hearing the parties consented to referring the matter to the Community Justice Centre (**CJC**) for mediation. By mediation in the CJC, both parties entered into an agreement to “leave each other alone” and “to walk away” should they see each other on the street.³

CLCs have also reported instances where police did not investigate criminal allegations made by a person with a disability who lives in a residential setting. There is a tendency amongst service providers to see incidences of violence or abuse as policy issues rather than criminal offences.

“Joe”, who is 20 years of age and has severe autism and intellectual disability, was the victim of a violent attack by another resident in a group home. Joe’s parents contacted the police to request an intervention order to provide a measure of protection for their son. The police referred the matter back to the state government authority that operated the group home. After refusing to offer a physical separation of the living areas in the group home and a long saga of mismanagement of the issue, pressure was placed on Joe to move to another group home.⁴

Some CLCs and other support organisations assist victims to ensure perpetrators are brought to justice. Villamanta Disability Rights Legal Service reports that several clients had been sexually abused by a worker while living in residential care. Villamanta supported the clients and ensured that their matters were pursued, the perpetrator brought to justice and crimes victims compensation sought.

Similar issues are raised in a case provided by the Mental Health Legal Centre which illustrates the difficulties that people with psychosocial disability face if their allegations/reports of crime are not believed and/or not acted upon, in particular if they are in psychiatric or other facilities and dependent upon staff for support and referral to police for investigation. It ultimately affects the extent to which they can seek redress through the criminal justice system or otherwise.

“Samuel”, a patient in a psychiatric facility, complained to nursing staff that he had been sexually assaulted earlier that morning. He requested the member of staff to contact police and his consultant psychiatrist. Samuel’s requests were not acted upon. It was only six days after the incident, when an independent consumer consultant raised Samuel’s complaint of sexual assault with the psychiatric facility that an investigation was then commenced. It was only then that the consultant psychiatrist was notified. No report was made to police and Samuel and his consumer consultant were not made aware of the outcome of the investigation. The handling of the patient’s complaint was in direct contravention of the Office

³ Case study from Northern Rivers Community Legal Centre.

⁴ Disability Rights Now, Civil Society Report to the United Nations Committee on the rights of people with disabilities, compiled by Disability Representative, Advocacy, Legal and Human Rights Organisations, August 2012, p.108.

of the Chief Psychiatrist guidelines regarding managing of allegations of sexual assault in acute in-patient units. Mental Health Legal Centre assisted Samuel to make a complaint to the Health Services Commissioner about the matter. He received a written apology and was given a copy of amended guidelines regarding procedures for staff when handling allegations of sexual abuse, which included notification to staff that breach of the guidelines would result in disciplinary action.⁵

Another barrier concerns clients' ability to access an interpreter in a timely manner in order to provide a timely account of the alleged incident. This can impact on memory and can raise questions around why they may have delayed making a statement.

Victims' ready access to counselling is not always made available and this may have a detrimental impact on working towards their recovery from the effects of the incident that led to making the complaint to the police.

Observations in relation to perceptions that a "special witness" may be too quickly "labelled" an unreliable witness. This may cause premature decisions not to proceed with a matter and/or preventing further investigations that may assist in corroborating the victim's account.

CLCs are concerned that there is a presumption that people with disability are not able to participate in legal proceedings.

"John", who has an intellectual disability, was badly assaulted in his home town. During the attack symbols were carved into John's head and he was hospitalised for five days to recover from his injuries. Both John's parents and his support worker spent a lot of time convincing John to give a statement to the police. He knew who had assaulted him and was able to provide a statement to the police but nothing has happened since as the police have said John is not a credible witness.⁶

The case studies in this section illustrate the systematic barriers that people with disability face when they are the victims of crime. The Victorian Human Rights and Equal Opportunity Commission have recognised this, and is currently conducting research into the experiences of people with disability in Victoria when they report crime.⁷ The project aims to:

- identify the nature and extent of crimes against people with disability in Victoria
- understand what barriers people with disability face when reporting crime and gaining redress
- work with Victoria Police and other authorities to break down these barriers and provide better services to people with disability.

Similar projects should be undertaken in each state and territory.

2.2 Laws that criminalise disability

A number of Australian laws, policies and practices deny or diminish recognition of persons with disability before the law, or deny or diminish their right to exercise legal capacity. Many

⁵ Case study from Mental Health Legal Centre.

⁶ Queensland Advocacy Incorporated, 'Submission to the Shadow Report', email dated 14 July 2010, 'John's Story'

⁷ See <http://www.humanrightscommission.vic.gov.au/index.php/training/item/619-experiences-of-people-with-disabilities-reporting-crime>.

people with disability are not being identified as having a disability either when they are dealing with police or in court. As a result, people with disability are not receiving the supports, adjustments or aids they need.

“Andrew” has a number of intellectual and physical disabilities. Due to his physical disability, he is unable to wear a bicycle helmet. Andrew cycles to his workplace because he has no private transport. As the law currently stands in New South Wales, Andrew breaches the road rules every time he rides to work. Last year, Andrew received twenty-six penalty notices and over \$900 in fines for failing to wear a bicycle helmet whilst riding.

In most other Australian jurisdictions, an exemption exists which excuses people from wearing bicycle helmets if they provide a medical certificate as evidence that their disabilities or physical characteristics make it impossible for them to wear a helmet. If a similar exemption was included in New South Wales law, Andrew would be able to maintain his independence and participate fully in his community without being fined due to his disability. In addition, Andrew would not have had to rely on the help of legal assistance providers to, among other things, have the enforcement orders annulled and have the matter dealt with in the Magistrates Court pursuant to the *Mental Health (Forensic Provisions) Act 1990 (NSW)*.⁸

CLCs are concerned that in some cases clients are put through the stress and anxiety of interacting with the criminal justice system because of behavioural issues related to intellectual disability.

“Keith” has dual diagnoses of moderate to severe intellectual impairment and psychosis. He had been on bail after a serious assault on his elderly grandmother whilst he was visiting her earlier in the month. He was then charged with three Common Assaults over a two day period at the end of the month against co-residents at a hostel he was residing at in Ipswich.

Keith had never been connected with Disability Services Queensland and had no legal guardian. Keith had engaged over the years with multiple mental health treating teams. The psychiatric history painted a picture of a man that, despite repeated contact with various Mental Health Services over a period of twenty years, various diagnosis and treatment regimes, continued to struggle on a personal and social level. Keith required a high level of support.

Keith was seen by the Mental Health team after being arrested and declared to have no mental health issues and that the offending was due to behavioral deviancy. He was unable to go back to the hostel, his family didn’t want to accommodate him, given the escalating violence and the fact that protection orders had been made.

The Magistrate was in a position where releasing Keith would more than likely see him homeless and a potential risk to himself or others: however, despite the mental health assessment, he was of the view that our client should not be incarcerated due to the likelihood of a mental health defense becoming apparent. Keith’s legal and support team needed to find suitable and supervised accommodation for Keith immediately.

The support team contacted a long-term family friend, “Charlie” who resided in NSW who agreed to accommodate Keith until the outcome of the proceedings. Charlie flew to

⁸ Case study from Hunter Community Legal Centre.

Queensland and attended court with DLP team. Keith was released into Charlie's care on a notice under *s11B of the Bail Act 1980*.⁹

"Pete" is assessed as having an intellectual impairment with severe behavioural disorder and hearing loss. He displays aggression quickly when under stress. Pete was referred to a community legal centre after he was charged with common assault on a youth worker within his placement residence. Pete admitted his behaviour to the police and has no previous convictions. He appeared in court in July 2013 where he was released absolutely and no conviction recorded. This is the lowest form of punishment/order available to a sentencing court. It reflects that the court viewed the offence as extremely minor in the circumstances, and perhaps unnecessary to involve a court.

The process of being arrested, interviewed by police and appearing in court (which was a new and strange process) caused Pete an extreme amount of stress due to his disability.

The policy at Pete's residence requires that when such an incident occurs, a complaint must be made to police to encourage Pete to stop behaving illegally in the future. However, given Pete's disability, police intervention is unlikely to act as a personal deterrent for Pete and his behaviour is likely to continue in the future. Pete is a person who does not have a defence under mental health legislation, due to his lack of self-control due to his disability; he is likely to come before the criminal courts in the future as his anti-social behaviour is seen as a criminal act.¹⁰

This type of response is not limited to criminal acts; the penalisation of anti-social behaviour is extending to the provision of services such as housing.

"Ethel" is an elderly woman with mental illness who resides in public housing. The Department is bringing eviction proceedings against Ethel for objectionable behaviour, although the Department's evidence merely demonstrates the symptoms of her various physical disabilities and her ongoing mental illness. In particular the Department is relying on Ethel's loud and forced manner of speech, which is caused by polyps and lesion on her throat, and night-time wakefulness and corresponding cries and rants, which stem from her schizophrenia and post-traumatic stress disorder.

Ethel's lawyers are relying on the tenancy tribunal's duty to make decisions that are 'just and equitable between the parties' to say that the Department needs to make efforts to accommodate her in a way that causes the minimum nuisance to other residents, rather than simply trying to remove her from the equation. The matter is yet to be heard.¹¹

Similarly, people with disability can be unfairly and disproportionately swept up in the child protection jurisdiction. Parents who have a disability are significantly over-represented in this area, as they often have their children removed from their care and their access to them restricted, and are frequently permanently cut off. It is therefore vital that these clients receive appropriate legal advice and representation in regard to this extremely important area of law. Villamanta Disability Rights Legal Service reports of some successful outcomes for some of their clients:

⁹ This section applies where a person lacks capacity to understand a bail undertaking.

¹⁰ Case study from Logan Youth Legal Service, Youth and Family Service (Logan City) Inc.

¹¹ Case study from SunCoast Community Legal Service

- continued access of parent to child was ensured and DHS varied its application for permanent removal without Permanent Order, with the consent of the client.
- continued access of parent to child was ensured, after Villamanta successfully negotiated reduced conditions on the order being sought and their client agreed by way of consent to an extension of the order.

Laws and policies that criminalise or otherwise penalise disability and disadvantage should be revoked.

While perhaps beyond the scope of this inquiry, CLCs also see clients with an intellectual disability, a mental illness and/or acquired brain injury who have entered into contracts without any apparent capacity to understand what they are signing or their obligations under the contract, including affordability and impacts on their credit rating. The purchase of a motor vehicle; phone; whitegoods and electrical goods are common examples.

Mobile phone contracts, often entered into as a result of telemarketing, are of particular concern for many of our clients and would rate as the highest area of abuse for vulnerable people. In these matters, CLCs often liaise with retailers, telecommunication corporations, motor dealers and others in order to negotiate and/or void these contracts on behalf of these clients.

2.3 People with disability in the justice system

People with disability are over-represented in the civil, criminal justice and prison systems as complainants, litigants, defendants and victims. It is common for persons with disability to encounter disadvantages and barriers when interacting with the justice system as a result of inherent prejudice, discrimination and inadequate support and recognition of the complex and multiple support needs often associated with disability.

In the experience of CLCs people with disability may experience barriers to justice due to a number of factors, including an inability to properly comprehend complex legal and technical language and inflexible legal processes which fail to recognise and effectively address the needs of people with disability.

There are concerns that records of interviews may be conducted without the necessary support person being present despite the provisions of Queensland's *Police Powers and Responsibilities Act* which requires police officers to ensure that an appropriate support person to be present when interviewed and when statements are taken. CLCs commonly represent clients who were not provided with an appropriate support person or, indeed any support person as well as no interpreter/s for people with hearing loss.

The following case study shows how infringements can have a disproportionate effect on a person with mental illness, and the potential for incidents to escalate the distress of a person with mental illness and result in the (inappropriate) criminalisation of their behaviour when unwell. It therefore highlights the need for specialist training of officers and police in responding to a person in crisis, as well as the need for specialist legal services to assist a person in responding to charges laid against them.

“Jane” has a diagnosis of paranoid schizophrenia and receives a Disability Support Pension which was managed by State Trustees under an Administration Order. She was living in a rooming house at the time and her wallet had been stolen so she had to travel by public transport to attend, in person, State Trustees offices in order to get her weekly allowance. On one occasion when she attended State Trustees, she was not given any money. On her way back home, ticket inspectors requested Jane produce a valid ticket, but she said she didn’t have one. Jane tried to walk away but was arrested and police were called when she became agitated. An officer took hold of Jane and a scuffle broke out. In addition to failing to produce a valid ticket, six other charges were laid against Jane, including using offensive language, assaulting an officer and resisting arrest. Shortly after the incident Jane was admitted to a psychiatric inpatient unit for treatment. MHLC assisted Jane in defending the criminal charges, for which she was facing potential imprisonment. We highlighted Jane’s mitigating circumstances and presented psychiatric evidence that supported the fact that she was acutely unwell at the time of the incident and that, because of her mental illness she misinterpreted the actions of the officers and was attempting to evade what she perceived as a threat to her safety. Jane was given a 12-month undertaking, without conviction, and ordered to comply with psychiatric treatment.¹²

People with disability often experience difficulty with access to legal assistance and other support services.¹³ An individual’s disability can also make obtaining the required instructions and initiating the relevant proceedings difficult.

“Grace” is an Aboriginal woman who has a chronic illness, a hearing impairment, a mild intellectual disability, depression and dyslexia. Grace was involved in a financially, emotionally and physically abusive relationship which worsened her mental and physical health. Grace has been trying to regain contact with her children, who are being physically abused by their father. Their father restricts the children’s contact with Grace by changing telephone numbers and moving the children. In order to have contact with her children, Grace will need court orders. Due to her multiple disabilities and, among other things, the length of time since she has lived with her children, Grace’s prospects of getting the relevant court orders are poor.

Grace’s mental and physical health make it difficult for her to access the justice system. She requires a great deal of support in order to obtain access and will likely require extensive legal representation to finalise the matter. A request has been made to transfer Grace’s matter to a more experienced solicitor due to the complexity of the situation. While Grace is receiving support from a variety of sources, her disability makes accessing the justice system difficult.¹⁴

Access to justice is not an isolated issue –whether a person has the capacity to engage effectively with the justice system is a significant issue. For some people, ‘fitness for trial’ issues are not identified by defense lawyers, duty lawyers, arresting police, police prosecutions, and Magistrates, even when it is overtly noticeable that they lacked understanding of the legal process:

¹² Case study from Mental Health Legal Centre.

¹³ Legal Aid Queensland, *Legal Aid Queensland submission: Developing a national disability strategy* (2008) p 8.

¹⁴ Case study from Women’s Legal Centre ACT.

The Court of Appeal considered fitness for trial in *R v AAM; ex parte A-G (Qld)* [2010] QCA 305. The Court commented (at [9]):

It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences. The Magistrates Court has attempted to meet this problem through its Special Circumstances Court Diversion Program which apparently presently operates only in the Brisbane area. This program assists categories of vulnerable people including those with impaired decision-making capacity because of mental illness, intellectual disability, cognitive impairment, or brain and neurological disorders. This commendable initiative, which allows for suitable compassionate supervisory and supportive bail and sentencing orders to be made in appropriate cases, may well be effective in assisting these vulnerable people. But it does not and cannot provide a satisfactory legal solution where people charged with summary offences under the criminal justice system are unfit to plead to those charges. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system. **(footnote omitted)**

To date, no legislative reform as recommended in this decision has occurred.

Queensland's Special Circumstances Court was defunded in 2012, despite 944 of the 1,668 people referred to the diversion program being assessed as "eligible", meaning that 56 per cent were diverted from prison or traditional court sentences.

In situations where adequate supports are available, these barriers can be removed. CLCs and other services can show examples where assertive outreach and support, targeted services and ongoing assistance can remove barriers for people with disability, and reduce contact with the criminal justice system.

"Murray" has struggled with schizophrenia and drug addiction, which have contributed to complex problems in his life. He was homeless and in and out of prison for many years. He contacted Prisoners' Legal Service Inc for assistance with his debts, which totalled over \$70,000 including tax debt, housing debt, consumer debts, Centrelink debt and on-the-spot fines debt.

Murray's lawyers helped him to declare bankruptcy, meaning that he could come out of prison to a fresh start. Prisoner's Legal Service is assisting him to have his driver's license disqualification lifted to help him with employment opportunities.

Prisoner's Legal Service runs a 'Safe Way Home' project which assists Murray and others to prepare a parole application that outline relapse prevention plans and reintegration plans to ensure that they was ready for release. After his release, Murray continues to see the CLC's financial counsellor post release and remains off drugs, in housing and employment and crime free. Most importantly, his 12 year old daughter appreciates the stability and coping skills that he is developing as he works to rebuild his family as the sole parent involved in her life.¹⁵

Of course, legal advocacy isn't limited to courtrooms; ensuring people can access legal services early to prevent legal issues escalating is vital.

¹⁵ Case study from Prisoner's Legal Services.

2.3.1 Substituted decision making

There is a presumption that certain people with disability are incapable of making their own choices. People with disability are often not being viewed as people with rights, and little respect is shown for their inherent dignity.

Matters of guardianship and administration are extremely important to many people with disability as Administration orders and Guardianship orders can severely restrict an individual's freedom to make their own choices. In some instances, less restrictive alternatives may be available to certain people. It is important that a person with disability has access to legal advice and representation when these orders are being considered so these alternatives can be put forward. In addition, people with disability may require assistance to communicate with their administrator and have their views and wishes heard.

An application was made to appoint a guardian and an administrator over “Susan’s” affairs. The main objective of the application was to force Susan to live in accommodation chosen by her relatives without Susan’s wishes being taken into account. Without proper advice or legal representation, the less restrictive option may not have been chosen which, in the end, allowed Susan’s wishes as to where she wanted to live to be the deciding factor.¹⁶

Similarly, people facing proceedings in immigration jurisdictions can have difficulties providing instructions to their lawyers. Often, the result is the appointment of statutory office holders to instruct lawyers and make decisions about the

“Tuhi”, a person from a Pacific Island, unsuccessfully applied for refugee status 15 years ago. Due to ongoing fear he remained in Australia without a visa and then in 2012 suffered a stroke which caused significant cognitive disability and seriously affected his ability to communicate. He required daily assistance with management of medications and basic functional tasks.

The Queensland Civil and Administrative Tribunal (**QCAT**) appointed the Adult Guardian. Queensland’s Refugee and Immigration Legal Services (**RAILS**) was contacted by the Immigration Department and then worked closely with the Adult Guardian, and Tuhi, to obtain instructions and lodge a complex application for Ministerial intervention. The application was decided quickly and successfully which allowed Tuhi to access Centrelink and a Residential Care facility. This freed up a hospital bed which the client has been occupying for considerable time, saved the hospital significant funds and helped relieve the burden on the public hospital system. Tuhi would have been unable to get adequate medical support in his home country and is now able to live permanently in Australia. His condition has begun to slowly improve.¹⁷

“Raphael” arrived on a visitor’s visa. He had previously lost his permanent resident status after living overseas for some years and now wanted to return. On the flight in he became confused and tried to open an exit door on the plane and was hospitalised on arrival.

Raphael was assessed as having significant cognitive deficits, progressive dementia and impaired capacity, The Office of the Adult Guardian was appointed by the Queensland Civil and Administrative Tribunal and the case was referred to RAILS. RAILS worked with the

¹⁶ Case study from Villamanta Disability Rights Legal Service.

¹⁷ Case study from Refugee and Immigration Legal Service QLD.

Adult Guardian to obtain instructions and lodge a successful application for a permanent visa based on Raphael's continuing substantial ties to Australia. He had no ties overseas.¹⁸

Sometimes there is a less restrictive way of dealing with the issues affecting our clients. Because of this it is important that the person has access to legal advice and representation when administration orders are being considered. In some instances the orders can be of benefit as they can provide authority that helps family members, or other support people, to get things done for our clients. Sometimes clients need help to communicate with their administrator and have their views and wishes heard.

¹⁸ Case study from Refugee and Immigration Legal Service QLD.

3. Recommendations for reform

Improve training to police, the judiciary, court staff, duty lawyers, prosecutors and private solicitors involved in the criminal justice

Regular training and adequate resourcing, developed and provided in consultation with people with cognitive disabilities and their advocates, should be provided to the police, the judiciary, court staff, duty lawyers, prosecutors and private solicitors involved in the criminal justice and civil law systems in order to improve their identification and understanding of the needs of clients with any cognitive disability, and to enable those clients to be assisted to engage effectively with all aspects of the legal system. Training and associated resourcing should include information about different forms of cognitive disabilities and provision for the related needs of persons with such disabilities.

Increase availability and accessibility of legal services

Commonwealth and State Governments should increase funding for specialist legal community centres and Legal Aid lawyers with expertise in disability, in order to enable people with disability to have free/affordable access to legal representation, irrespective of the complexity of their matter. Adequate funding should also be provided to enable people with disability, their families and carers to have access to specialist advocacy services so that they can more easily negotiate the justice system.

Improve data collection

The current failure of justice databases, including police and court systems, to reliably record data about people with disability must be addressed as a priority. Data collection and research must include disaggregation by gender and type of disability, and examine the experience of people with disability as victims, witnesses and offenders.